United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-6106

B

United States Court of Appeals For the Second Circuit

SECURITIES & EXCHANGE COMMISSION,

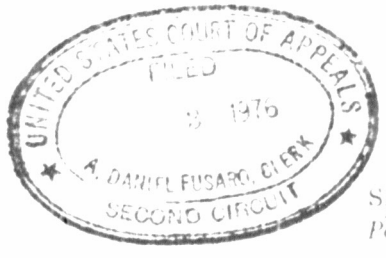
Plaintiff-Appellee,

-against-

SAMUEL H. SLOAN, individually and
d/b/a SAMUEL H. SLOAN & CO.,

Defendant-Appellant

PETITION FOR REHEARING AND SUGGESTION THAT THE REHEARING BE EN BANC



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PRELIMINARY STATEMENT

This appeal from various orders of the Hon. Robert J. Ward of the United States District Court for the Southern District of New York was affirmed in part and dismissed in part. See S.E.C. v. Sloan slip op. 3655. (2d Cir. May 10, 1976). The appellant now petitions for a rehearing and suggests that the rehearing be in banc.

ARGUMENT

POINT I

THE OPINION OF THIS COURT ARRIVES AT AN UNJUST RESULT WHICH CREATES A LOOPHOLE IN THE LAW AND CONSEQUENTLY MUST BE REVERSED

The opinion of this court states that the appeal of Samuel H. Sloan ("Sloan") from the "most significant order,"

namely the order of the adjudging him to be in contempt, is dismissed as (1) nonappealable and (2) moot. Considering these points separately, it should be apparent that the contempt order appealed from is neither nonappealable nor moot. Moreover, it should be noted that the S.E.C. is currently prosecuting a great many lawsuits similar to this one in various parts of the United States and if the decision here is allowed to stand and if it is followed by the other circuits, the result will be to create a loophole in the law which will frustrate all appellate review in lawsuits of this sort.

To begin with, the opinion of this Court contains a number of factual errors and omissions and should be modified to correct these points. However, when modified, it will be seen that this court's opinion is erroneous and must be reversed.

The opinion, in footnote 2 thereof, states:

> "The September 3 order adjudged Sloan in civil contempt and gave him 20 days to purge himself. When he did not, a further order of civil contempt was entered on September 26, 1975 ordering Sloan's arrest."

This footnote contains an error and an omission. The omission lies in the fact that the opinion does not state what it should state which is that Sloan was actually arrested and went to jail. This is not a harmless error because had the court stated that Sloan went to jail it would then have had to state how he happened to be incarcerated, and how he happened to get out and in amplifying on how all this came about the court would have had to put the facts in a light which would

have demonstrated Sloan's right to appeal and the fact that the appeal is not moot.

The factual error in footnote 2 of this court's opinion can be seen from that part of Judge Ward's September 3, 1975 order which provided:

> "it is further
>
> ORDERED that, in the event the defendant Sloan fails to appear before the Court on the date above indicated, the Commission is authorized to serve a certified copy of this Order of Civil Contempt upon the United States Marshal, and the United States Marshal shall, upon receipt of a certified copy of this Order of Civil Contempt, arrest Samuel H. Sloan and confine him to the Metropolitan Correctional Center, 150 Park Row, New York, New York, until he permits immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Sloan & Co."

The opinion of this court makes it appear that there are two orders: one dated September 3, 1975 and another dated September 26, 1975. One faced with this misapprehension might conclude that Sloan only appealed from the September 3, 1975 order which was superseeded by the September 26, 1975 order and hence that Sloan's appeal was moot. Again, once it is recognized that there is no September 26, 1975 order, this changes the facts in such a way as to make it apparent that a different result is required.

Fed. R. Civ. P. 79(a) states:

> "All papers filed with the clerk, all process issued ..., all ... orders and judgments shall be entered chronologically in the civil docket ...."

On examination of the docket sheet in this case shows that the last order involved in this appeal was entered on

September 3, 1975.[1] Under these circumstances, it is error for this court to make any reference to an order Judge Ward may or may not have made on September 26, 1975. International Business Machines Corp. v. Edelstein 526 F.2d 37, 45 (2d Cir. 1975).

It should be noted that Judge Ward followed an objectionable procedure with respect to his February 4, 1976 order which is referred to in the third paragraph of this court's opinion. It can be seen on page 96 of the transcript of the proceedings on that day that Judge Ward requested that the clerk of the Court of Appeals send him the original record of this appeal. Upon receipt of this record, Judge Ward then endorsed his February 4, 1976 order on the back of his September 3, 1975 order. As a result, his February 4, 1976 order was not entered on the docket sheet and instead the papers were returned directly to the Court of Appeals where, Judge Ward said, "this file was taken from."

This procedure, which, among other things, involves tampering with the files of the Court of Appeals, violates the Judicial Code and should not be countenanced by this court.

This court should not express tacit approval of an illegal

1. On December 29, 1975, Judge Ward entered three orders dated December 24, 1975 which stayed further discovery until Sloan "purges his contempt." These are the only orders after the September 3, 1975 order which are presently entered on the docket sheet. The full text of one order is:

> "December 24, 1975
> Motion granted. All further discovery by defendants is stayed until defendant Samuel H. Sloan ("Sloan") purges his contempt by permitting examination in an accessible place by representatives of the plaintiff of the books and records of Samuel H. Sloan & Co. as heretofore ordered by this Court.
> It is so ordered."
>
> R.J.W.

procedure by citing Judge Ward's February 4, 1976 order as the basis for its decision.

At this point, it has been demonstrated that this court's opinion contains at least two factual errors. Consequently, there is a question of whether these are harmless errors or whether a new and different decision is required. It should be noted that these errors on appeal were made possible largely by the S.E.C.'s inadequate presentation. The S.E.C. filed a seven page brief which did not cite the cases or argue the points made in this court's opinion. The attorney whom the S.E.C. sent to argue the appeal orally obviously had not read the briefs and did not even know what orders were being appealed from. This lack of an adversary should have been sufficient to require a summary reversal of Judge Ward's order. However, that would have created another problem the existance of which demonstrates that this petition for a rehearing and suggestion that the rehearing be in banc should be granted.

As the court's opinion notes, Sloan's appeal from the underlying order of preliminary injunction was dismissed along with two other Sloan appeals on January 7, 1976. This action was taken sua sponte since the S.E.C. never requested that these appeals be dismissed. Since that time, Sloan has taken every possible measure to have these three appeals reinstated which indeed the decision in United States v. Sperling 506 F.2d 1323, 1345 n. 33, which the court cited, indicates that he should be able to do. Sloan appeared in court less than 30 days after January 7, 1976 and filed a motion to reinstate these three appeals. Although this motion was not opposed by the S.E.C. it was denied by a panel of the same three judges which originally dismissed Sloan's appeal. Sloan then filed a petition

for a rehearing and a suggestion that the rehearing be in banc with respect to all three appeals. These petitions were accepted for filing by the court. However, this same panel of judges treated Sloan's petitions as motions and denied them all summarily on April 13, 1976. The order of denial specifically states that the "motions ... that the rehearing be in banc are denied in all respects." This is clearly a violation of the rules of this court and of the Federal Rules of Appellate Procedure. In "Appeals to the Second Circuit" by the Committee on Federal Courts of the Association of the Bar of the City of New York, the correct procedure is explained on page 49 as follows:

> "While the petition for rehearing will be submitted to the original panel, a request for hearing in banc will go to all of the judges of the Court in regular active service as well. If any judge of the panel or any regular active judge requests a vote for in banc consideration, a vote is taken on the in banc question. In addition, a judge may, sua sponte, suggest in banc rehearing. This may occur at any time, even after the 14 day period specified for petitions."

In this case, Sloan has been making a diligent effort to have the dismissal of the first three appeals reviewed by an in banc court but he has been frustrated in his efforts apparently because the presiding judge of the panel which dismissed Sloan's three appeals has decreed that Sloan's petitions would not be distributed to the other active judges of this court. This also makes it unlikely for any other judge sua sponte to request reconsideration because there is no procedural mechanism for Sloan to make the other judges of this court even aware of Sloan's efforts to obtain in banc reconsideration.

It should be said that the actions of the presiding judge in question have exhibited a preternatural solicitousness for the well-being of the S.E.C. and a seeming callousness towards Sloan's plight quite out of keeping with the judicial traditions of justice and

fair play towards litigants. This particular judge, indeed, is displaying an inappropriate "holier than thou attitude" for he himself was once remanded to the custody of the United States Marshal because of his contumaceous refusal to obay a court order and to turn over documents belonging to the S.E.C. which were in his possession.[2] This willingness to go to jail to protect the interests of the S.E.C. creates an appearance of impropriety which should disqualify him from sitting as a judge in this case. cf. Laird v. Tatum 409 U.S. 824 (1972). This same "preternatural solicitousness" was more recently displayed in S.E.C. v. Stewart, Judge 476 F.2d 755, 529 (2d Cir. 1973) (dissenting opinion) which would have issued a writ of mandamus to a district judge to prevent him from acting to protect the Fifth Amendment rights of defendants in civil enforcement actions brought by the S.E.C. The rationale of that dissenting opinion, incidently, was that a judge should not act on his own but should await an initiative from the U.S. Attorney. However, here, with the tables turned, the same judge has sua sponte dismissed three Sloan appeals, although not requested by the S.E.C. to do so, and has gone even further to violate flagrantly the rules of this court by refusing to permit Sloan's petition for a rehearing and suggestion that the rehearing be in banc be distributed to the other active judges of

2. See Appeal of the United States Securities and Exchange Commission 226 F. 2d 501 (6th Cir. 1955). However, as the U.S. Marshal was escorting him through the U.S. Courthouse on the way to jail, they per chance encountered a Court of Appeals judge who, after hearing of the situation, rounded up two other Court of Appeals Judges who immediately ordered his release. Thus, the judge in question was never safely behind bars. In contrast, in the case presented here, no judge of the court of appeals rushed to secure Sloan's release.

this court.

This circumstance creates a problem here. The panel of judges who sat on the instant appeal was entirely different from the panel which dismissed the three prior appeals. However, the law of this Circuit has been that when reviewing an order of the type involved here, the underlying order on which the contempt is based may be reviewed. United States v. Baird 241 F.2d 170, 172-173 (2d Cir. 1957) citing United States v. United Mine Workers 330 U.S. 258, 294-295 (1947) and other authorities. However, had the panel followed this course and reviewed the contempt order and the underlying injunction on the merits, it might have run into conflict with the panel which dismissed Sloan's appeal from the underlying preliminary injunction. The fact that this consideration was present and could not have been far from the minds of the Judges, who decided this appeal, require that the entire matter be given in banc reconsideration.[3]

"Appeals to the Second Circuit", supra is in accord with this view and states on page 48 that "the court may use this procedure to avoid ... a conflict between ... decisions by different panels." However, there is another reason for in banc reconsideration which is that this Court's decision here is wrong. This can be seen from an analysis of the facts.

The decision states that the contempt order is not appealable because Sloan is a party. However, it is apparent that the court is

3. The petitioner believes that all four appeals should be given in banc reconsideration and takes this opportunity to urge that this be done. The petitioner has otherwise exhausted his remedies and there seems to be no provision which allows him to file additional papers in the three dismissed appeals. Nevertheless, any active judge of this court may sua sponte suggest in banc reconsideration.

not certain of the correctness of this holding first because it cites Moore's Federal Practice and second because it goes on to state that the appeal is moot. If the court were certain that the order is not appealable, it would have had no need to state that the appeal was also moot. Indeed, if it were clear that Sloan had no right to appeal, this court could well have dismissed Sloan's appeal when it denied Sloan's motion for a stay of the contempt order on September 26, 1975.

The citation to Moore's Federal Practice three times in this courts opinion is not persuasive and indeed indicates that the opinion is open to criticism.

Sloan cited Moore's as well to establish that the same orders were appealable. This is not surprising since Moore's Federal Practice cannot and does not pretend to provide the final answer to every question of procedure likely to arise in the federal courts. Thus, the weakness of this court's decision is demonstrated by its excessive need to rely upon Professor Moore.

In any event, Professor Moore's idea that a party may not appeal from an order of civil contempt is based upon Fox v. Capital Company 299 U.S. 105 (1936). However, that decision contains nothing more than unfortunate dictum which has not been followed in a single actual case. In Fox, the court merely held that an order denying a motion to quash a "witness subpoena" was not appealable. This is clear from Capital Co. v. Fox 85 F.2d 97 (2d Cir. 1936). In the forty years which have followed, there has never been a reported case which has held that a person who was actually in jail could not get out because of the unavailability of the remedy of appeal. Indeed, in Sibbach v. Wilson & Co. 312 U.S. 1 (1941), only five years

after Fox, the Supreme Court entertained an appeal from an order imprisoning the plaintiff for civil contempt and ordered her release.

The rule established by the Supreme Court in Cohen v. Beneficial Industrial Loan Corporation 337 U.S. 541, 545-546 (1949) was that 28 U.S.C. 1292 allows appeals from "orders other than final judgments when they have a final and irreparable effect on the rights of the parties." Clearly, the fact that Sloan went to jail had an irreparable effect on his rights and it is thus obvious that the order which put him in jail is appealable. Moreover, the rationale for not permitting the immediate appeal by a party from an order of civil contempt is based upon the presumption that the contempt order will at some point be merged into a final judgment from which an appeal can be taken. However, in this case, Judge Ward, on December 24, 1976, stayed further proceedings until Sloan purged himself of contempt. If under these circumstances, it can be held that the order of civil contempt cannot be appealed, the result could be that Sloan would sit in jail for the remainder of his life without the remedy of appellate review ever becoming available. Clearly, the holding that the contempt order is not appealable is erroneous under the circumstances here and must be reversed.

As noted previously, this court's decision creates a loophole in the law and by now it should be becoming more apparent what that loophole is. The S.E.C. commenced this lawsuit to obtain a mandatory injunction requiring the production of Sloan's financial records. The S.E.C. did not serve a subpoena on Sloan although it had the authority to do so. The reason it did not do so is obviously that had the S.E.C. served a subpoena, Sloan would have had a route to obtain judicial review in the Court of Appeals. See e.g. S.E.C. v. Brigadoon Scotch

Dist. Co. 480 F.2d 1047 (2d Cir. 1973). Consequently, in an obvious ploy to avoid judicial review, the S.E.C. obtained a "temporary restraining order" which included a provision for a mandatory injunction requiring the production of Sloan's financial records. In short, the S.E.C. wanted to obtain the full relief requested in the adamnum of its complaint in the form of a temporary restraining order.[4] Since temporary restraining orders are ordinarily not appealable, a fact which the S.E.C. was quick to point out in its brief in 75-7056, Sloan tried to obtain review through a prerogative writ of mandamus. See Sloan v. Ward 75-3001 denied (2d Cir. January 16, 1975). However, the S.E.C. made no effort to enforce its temporary restraining order so Sloan stayed out of jail for the time being.

The S.E.C. then obtained a preliminary injunction on January 17, 1975 which included the same mandatory injunction provision. Still, the S.E.C. made no effort actually to examine Sloan's records until more than a month later and about the time it got around to doing so, Sloan was struck by an automobile with the result that both of his legs were broken. Shortly thereafter, the S.E.C. moved to have Sloan adjudged to be in contempt of court. Judge Ward granted this motion and the instant appeal resulted.

If this court's decision is allowed to stand, the S.E.C. will have a simple expedient whereby it can obtain financial and other records of every person and corporation in the United States without ever having to worry about the possibility of appellate review.

4. On this point, the court's opinion makes another apparent error in the first paragraph of its opinion. The lawsuit currently being prosecuted by the S.E.C. merely seeks to require Sloan to produce his records for inspection by S.E.C. officials. No request is made here that Sloan be required to maintain proper books and records. The S.E.C. already obtained that relief in a prior lawsuit. See S.E.C. v. Sloan 369 F. Supp. 996 (S.D.N.Y. 1974).

Instead of serving a subpoena, the S.E.C. will start a suit for a mandatory injunction requiring the production of financial records and will apply for an immediate temporary restraining order. The judge will be able to grant this temporary restraining order and/or a preliminary injunction knowing that appellate review can never be had. If the party adversely affected appeals and also produces the financial records, the appeal will be dismissed as moot. If the party adversely affected appeals and does not produce the financial records, the appeal will be dismissed in accordance with this court's decision to dismiss the appeal in Sloan v. S.E.C. 75-7056 (2d Cir. Jan. 7, 1976). Thus, regardless of what the party does, appellate review will not be available. Finally, if the party is adjudged to be in contempt of court, in accordance with this court's opinion here no appellate review can be had from that order.

It should be noted that at the hearing on February 2, 1976, Judge Ward explained this court's opinion as follows (transcript p. 7):

> "THE COURT: Yes, and I have been in communication with the Court of Appeals and the way the matter has been left is you were to appear here before me first and purge yourself of contempt and at such time as I was satisfied that you had purged yourself of contempt I was to permit you to proceed to the Court of Appeals."

The view expressed by Judge Ward there and on pages 12 and 26 of the same transcript was that Sloan could not appeal in any case until he had purged himself of his contempt. Thus, Sloan was threatened with having four more pending appeals dismissed, including an appeal not yet argued in which Sloan was barred for life from being associated with any broker or dealer, if he did not produce his financial records. On February 2, 1976, Judge Ward also stated that he was not going to permit Sloan to proceed to the Court of Appeals to argue an appeal

which had been scheduled for that morning. Fortunately, Judge Mulligan, the presiding judge in that appeal, saved the day by calling Judge Ward's courtroom and asking that Sloan be allowed to proceed to the Court of Appeals to argue his case.[5] However, during the oral argument, which Sloan presented while under arrest, one question from Judge Mulligan indicated that even that appeal, Sloan v. Canadian Javelin Ltd., Dkt. No. 75-7096, might yet be dismissed if Sloan's contempt was not purged forthwith.

It is clearly unfair to put Sloan in the position where if he purges himself of contempt he cannot appeal and if he does not purge himself of contempt he cannot appeal either. Yet, this is precisely what this court has done here and consequently the decision of this court must be reversed.

POINT II

THE ORDER APPEALED FROM IS ONE OF CRIMINAL, NOT CIVIL, CONTEMPT

This court's opinion states that Judge Ward's order "is both in form and substance an order of civil contempt." However, that is not enough. A federal judge may not throw someone into jail on the basis of civil contempt unless Congress has given him the statutory authority to do so. In re McConnell 370 U.S. 230 (1962) cf. United States v. Temple, 349 F.2d 116 (4th Cir. 1965). Since there is no statute, or at least none has been cited by the S.E.C. or by Judge Ward, which gives him the authority to act as he did, he can only have been acting to vindicate his authority and this constitutes criminal, not civil, contempt. Moreover, the underlying order was

5. Perhaps he remembered Ex Parte Milligan and the federal habeas corpus rights of prisoners.

one of preliminary injunction.[6] Disobedience of a final order of injunction is, of course, always criminal contempt. Logically, there is no difference between a preliminary injunction and a final injunction which makes disobedience of the former civil contempt and disobedience of the latter criminal contempt. In short, because of the nature of the underlying order, what is involved here is criminal contempt regardless of what the form and substance of the contempt order might be. There can be no doubt that Sloan has the right to appeal from an order of criminal contempt.

The statute which gives a judge the power to adjudge a person to be in civil contempt is 28 U.S.C. 1826. However, that section deals with "recalcitrant witnesses" and clearly does not apply here because Sloan was not requested to be "a witness in any proceeding before or ancillary to any court or grand jury ..." Moreover, even if 28 U.S.C. 1826 can be said to apply, this section also provides:

> "Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal."

In this case, the order of confinment was dated September 3, 1976. Sloan filed his notice of appeal on September 12, 1976 and simultaneously moved for a stay and an expedited appeal. On September 26, 1975 both motions were denied. Sloan then filed and served his brief on or about December 23, 1975. However, this brief was not accepted by the Court of Appeals until Jaunary 12,

6. Actually the form of the order signed by Judge Ward was one of a final injunction and was entered as a judgment by the clerk of the court. This fact keeps being ignored by Judge Ward himself.

1976.[7] The Court of Appeals did not receive the S.E.C.'s brief until February 18, 1976 or more than 30 days later,

In the Matter of Berry 521 F.2d 179 (10th Cir. 1975) the court delt with 28 U.S.C. 1826(b) and decided the appeal in two days. Here, however, because of the law's delays, the court has now decided that Sloan has lost his right to appeal and that the entire matter is moot. Clearly, this determination is unfair and erroneous and must be reversed.

For the reasons set forth in United States v. Schrimsher 493 F2d 842, 843-844 (5th Cir. 1974) it is clear that since the contempt involved here is criminal and not civil, the appeal cannot be moot.

POINT III

THIS APPEAL IS NOT MOOT BECAUSE IT INVOLVES A LIVE CONTROVERSY WHICH IS STILL BEFORE THE COURTS

The opinion of the court leaves the impression that this appeal has become moot in a manner similar to that of Matter of Berry, supra 521 F.2d at 181-182 where the contemnor was ordered to produce his financial records, ultimately did so, was released from custody, and had his appeal dismissed as moot. However, the case here presents

7. Apparently, this was because Sloan's brief was 72 pages long, or two pages oversized. Sloan had misapprehended the length this brief would come to when typed and had left the United States believing it would be well under 70 pages. Sloan then had to file a motion for leave to file an oversized brief which was granted on January 12, 1976. This gave the S.E.C. about three weeks extra to prepare a response.

a different factual situation because the S.E.C. did not seek one time only access to Sloan's financial records. Rather, the request of the S.E.C. here was for the power to maintain a continuous and never ending day to day surveyance over Sloan's financial record keeping. It is clear from See v. City of Seattle 387 U.S. 541, 543 (1967) that the relief the S.E.C. requested violates Sloan's constitutional rights. Moreover, the court's statement that Sloan purged himself of contempt after filing and briefing this appeal is erroneous. The fact is that Sloan took no action whatever. Sloan did not have the financial records in his possession and had not had them in his possession for a considerable period of time. Sloan did not make the decision to produce the financial records and indeed the decision was not his to make.

However, putting these factual errors aside, it can be seen that this court has repeatedly failed to consider Sloan's Fourth and Fifth Amendment constitutional claims. Its refusal to do so is shocking. If this court's decision is allowed to stand, it can be seen that no set of circumstances could arise where Sloan could have his Fourth and Fifth Amendment claims timely adjudicated. Sloan has already tried to the route of suing S.E.C. over this issue. His appeal in that suit was dismissed by this court. Sloan v. S.E.C. slip op. 2377 (2d Cir. March 4, 1976).

It should be remembered that the judges of this court are sworn to uphold the Constitution. However, whenever Sloan has presented his constitutional claims, the judges of this court have refused to entertain them. In this case, for example, Sloan has presented the same Fourth and Fifth Amendment claims to this court on five separate occasions. When the S.E.C. obtained a temporary restraining order,

Sloan petitioned for a writ of mandamus which was denied on January 16, 1975. When the S.E.C. obtained a preliminary injunction, Sloan moved for a stay and his motion was denied on February 13, 1975. When the S.E.C. then had Sloan adjudged in contempt of court, Sloan's motion for a stay of that order was denied on September 26, 1975. Subsequently, Sloan's first appeal was dismissed sua sponte on January 7, 1976 and the instant appeal was dismissed as "moot" on May 10, 1976. On all of these cases, Sloan has made essentially the same Fourth and Fifth Amendment arguments. Not only has the court refused to adjudicate them, but it has heaped considerable personal abuse on Sloan along the way, in the instant case characterizing Sloan as a "frequent litigant in this court".[8] What this court does not say and what in fairness it should say is that Sloan is a "frequent litigant" because he is diligently exhausting his remedies in a court which refuses to hear and entertain his claims. In sum, it should be apparent that this court's decision leaves the door open to endless litigation which indeed is continuing between Sloan and the S.E.C., that the issues involved are not moot, and that appellate review should be made available now.

POINT IV

THIS COURT'S DECISION WITH REGARD TO OTHER ASPECTS OF THIS APPEAL SHOULD BE RECONSIDERED

The appellant agrees that Judge Ward's grant to the S.E.C. of a protective order with respect to certain interrogatories is not independently appealable. However, he briefed this question

8. The judges of this court are also sworn to administer justice "without respect to persons", 28 U.S.C. 453, which they do not appear to be doing in Sloan's case. The two most recent opinions of this court leave the impression that if a more respectable litigant were to present essentially the same claims, he would be given better treatment.

consistant with 9 Moore, Federal Practice par. 110.25(1) p. 273 which states:

> "Once a timely appeal is taken from an order made appealable by statute, the power of a court of appeals should be plenary to the extent that it chooses to exercise it."

This point applies as well to some of the other orders referred to in this court's opinion. However, the opinion makes no mention of a ruling and order to which Sloan devoted considerable attention in both perfected appeals, namely Judge Ward's refusal to recuse himself. This case was not assigned by lot as is required by Rule 4(A) of the Calendar Rules for the Southern District of New York. Rather, Judge Ward usurped jurisdiction over this case before lots could be drawn and did this over Sloan's strenuous protest. Sloan had good reason to protest, as the subsequent course of events demonstrates.

Sloan subsequently filed an affidavit of bias setting forth grounds which the Supreme Court said in Taylor v. Hayes 418 U.S. 488, 501-503 (1974) are sufficient to require a judge to recuse himself from any contempt proceeding which, of course, is what is involved here. Judge Ward denied Sloan's motion and this forms the basis for a reviewable order. The court failed to mention this question in its opinion, perhaps due to oversight or perhaps due to a desire by this court to avoid embarassing Judge Ward. In either case, this petition for a rehearing should be granted and this Court should consider the question of whether Judge Ward should be recused from this case.

The next point regards press releases. The S.E.C. issues a press release whenever it commences a suit and this forms the basis for Sloan's objection pressed on appeal. These press releases are a direct

violation of Disciplinary Rule 7-107(g) as well as of Ethical Consolidations 7-13 and 7-33 of the Code of Professional Responsibility of the American Bar Association. This in itself should form a basis for disciplining the S.E.C. attorneys involved even were it not for Judge Ward's order. See Sheppard v. Maxwell 384 U.S. 333, 362-363 (1966).

It is obvious, particularly in cases where the S.E.C. obtains a "consent" injunction simultaneously with filing the complaint, that the primary purpose for filing the lawsuit is to give the S.E.C. an excuse to issue a press release. The Supreme Court has expressly held that this violates the constitutional rights of the defendants. Jenkins v. McKeithen 395 U.S. 411, 424-428 (1969). The applicable case law was discussed in the opinions in the recent decision of Paul v. Davis, __ U.S.__, 47 L.Ed. 2d 405 (March 23, 1976).

Although the court here questions whether Sloan even has the right to raise this issue on appeal, it is hard to see under what other circumstances appellate review could ever be available. As noted previously, Sloan's suit against the S.E.C. has been dismissed and the dismissal has been affirmed by this court.

The appellant also believes that in banc reconsideration should be given to this court's decision adhering to S.E.C. v. Robert Collier & Co. 76 F.2d 939 (2d Cir. 1935). The question presented is one of great importance and is worthy of in banc reconsideration. It is submitted that the fears expressed in the district court's decision, S.E.C. v. Robert Collier & Co. 10 F. Supp. 95 (S.D.N.Y. 1935), which held that the S.E.C. does not have the authority to prosecute actions in its own behalf, have since been realized. Moreover, it is submitted that just because Learned Hand wrote the opinion of Court of Appeals,

that does not make it certain that the opinion was correct.

Finally, reconsideration should be given concerning Sloan's motion to enjoin the S.E.C. from "harassment and annoyance." In general, it can be said that Sloan is not asking for much. He merely wants to be able to enjoy a certain degree of freedom and privacy which other citizens assume is theirs as a matter of right. The S.E.C. has yet to allege that even a single person has suffered injury because of Sloan's activities, but nevertheless the S.E.C. has kept Sloan subject to constant surveyance now for more than five years. Nearly three years ago, Sloan applied to withdraw his broker dealer registration and this application was denied by the S.E.C. On April 23, 1975, the S.E.C. revoked Sloan's broker dealer registration, and yet it has continued to press various claims against him since that time. At some point, Sloan is entitled to have this interminable litigation and surveyance brought to an end. It is submitted that this time is now and Sloan's motion should have been granted.

POINT V

THIS COURT SHOULD ADOPT THE SUGGESTION THAT THE REHEARING BE IN BANC

Without restating arguments already made, it should be pointed out that this court's opinion in International Business Machines Corp. v. United States, 471 F.2d 507, 512-513 (2d Cir. 1972) would clearly give Sloan the right to appeal here were it not for the fact that this decision was subsequently reversed by an in banc court. 480 F.2d 293 (2d Cir. 1973). The case presented now is even more suitable for in banc reconsideration. This appeal concerns without

doubt a number of frequently reocurring questions. Moreover, by now almost every active judge of this court has heard one aspect or another of this case. Under these circumstances, in banc reconsideration is appropriate to bring about uniformity and cohesiveness of decisions.

CONCLUSION

For all of the reasons set forth above, this petition for rehearing should be granted and the suggestion that the rehearing be in banc should be adopted.

Respectfully submitted,

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